Khong Yoke Bee v Lim Chong Yean and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCVC)(W)-1030–06 OF 2015 AND W-02(NCVC)(W)-1000–06 OF 2015
ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
19 SEPTEMBER 2017

Land Law — Sale and purchase of property — Agreement — Indefeasibility of title — Whether earlier sale and purchase agreement valid and enforceable — Whether subsequent sale and purchase agreement null and void — Whether subsequent purchaser acquired indefeasible title to property — Whether subsequent purchaser bona fide purchaser — Whether registered title of subsequent purchaser defeated — Whether property ought to be transferred to first purchaser — High Court ordered specific performance of first sale and purchase agreement — Whether specific performance appropriate — National Land Code s 340

Koperasi Pegawai Hutan Melayu Negeri Perak Bhd ('the Koperasi'), the registered owner of a piece of property, entered into a sale and purchase agreement ('the first SPA') with one Lim Chong Yean ('the plaintiff') for the sale of the said property. The property had a restriction in interest; it could not be transferred without the written consent of Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur ('the state authority'). The first SPA was conditional upon the Koperasi having obtained the written consent to transfer the property within three months. It was also incumbent on the Koperasi to apply and obtain the consent, including the obligation to appeal if required, within seven days from the date of the first SPA. The Koperasi made the application beyond the stipulated days and the same was rejected. On appeal, the state authority informed the Koperasi that the latter's supporting document was insufficient. However, the Koperasi did not respond. After the expiry of the plaintiff's caveat, the Koperasi entered into another SPA ('the second SPA') with one Khong Yoke Bee ('the second defendant') for the sale of the same property. This time, the Koperasi successfully obtained the consent from the state authority. The Koperasi returned the deposit paid by the plaintiff under the first SPA but the plaintiff returned the same to the Koperasi. Meanwhile, the property was transferred to the second defendant even though the plaintiff and his sub-tenant were still in occupation of the property. The Koperasi commenced proceedings at the sessions court against the plaintiff and his sub-tenant to recover vacant possession. The plaintiff counterclaimed against both the Koperasi and the second defendant. Later, the plaintiff initiated an action at the High Court to declare that the first SPA was valid and enforceable and sought specific performance of the same. In his claim against the second defendant, the plaintiff sought an order for a declaration that the second SPA

was subjected to the plaintiff's prior right to the property. The second defendant argued that: (a) she had no knowledge of the first SPA; (b) the breaches by the Koperasi had nothing to do with her; and (c) as the registered proprietor of the property, her rights and legal interest were protected under the National Land Code ('the NLC'). Both suits were consolidated and heard together by the High Court judge ('the HCJ'). At the conclusion of the trial, the HCJ allowed the claim by the plaintiff and dismissed the claim of the Koperasi. The claim made by the Koperasi for vacant possession at the sessions court was also dismissed. The HCJ went on to order specific performance of the first SPA and the second defendant was ordered to transfer the property to the plaintiff. Hence the present appeals by the Koperasi and the second defendant.

Held, allowing appeal by Koperasi in part; allowing appeal by second defendant with costs:

(1) As a registered owner, the second defendant had obtained an indefeasible title under s 340 of the NLC. This title could only be challenged and defeated by any of the stated grounds in s 340(2) of the NLC. The three grounds or exceptions to the indefeasibility laid down in s 340(2) are essentially, in a case involving: (a) fraud or misrepresentation to which the person having the title was privy to; (b) a registration obtained by forgery, insufficient or void instrument; and (c) where the title or interest was unlawfully acquired by the person having the title in purported exercise of lawful authority. Only if these exceptions existed could the registration of the second defendant's title be liable to be set aside. However, none of these grounds was raised by the plaintiff. Clearly, the second defendant's title was not challenged for being obtained through any of the means provided under s 340(2) of the NLC (see paras 14 & 16).

(2) The issue between the plaintiff and the second defendant was that of competing interest, the plaintiff's interest under the first SPA and the second defendant, under the second SPA. It has been translated into a contest between a registrable interest, if any, of the plaintiff against the registered interest in the property of the second defendant. The first SPA may have conferred unregistered interest on the plaintiff. However, the registration of title on the second defendant had indeed defeated any unregistered interest of the plaintiff. Since the registered title of the second defendant in this case had not been sought to be defeated under s 340(2), her rights and title were protected by the said provision. Therefore, the orders by the HCJ in causing the second defendant to transfer the property to the plaintiff was wholly wrong in law and was liable to be set aside. The order of specific performance of the first SPA was clearly unlawful (see paras 22 & 24).

(3) The law on granting specific relief confers the court the discretion to be exercised, by giving consideration to the facts and circumstances surrounding the case, the conduct of the parties and their respective contractual rights. The first SPA was entered in 2006. After entering into the first SPA, the plaintiff rented the property from the Koperasi and remained in occupation. He waited till 2013 to file a suit. The plaintiff sat on his rights while earning from the subletting of the property without any complaints for over six years. The Koperasi applied for the consent from the state authority, albeit out of time. When the consent was declined and an appeal was made, the plaintiff did not do anything more. The second SPA only took place in 2012. Under the above circumstances, the order of specific relief was not a suitable remedy. After such delay, the order of specific reliefs granted affected not only the interest of the second defendant but also the financing chargee bank's legal interest (see paras 34–36).

(4) The appeal by the Koperasi was allowed in part. The order of specific relief made by the HCJ against the Koperasi was varied by allowing the claim for damages by the plaintiff. The damages in lieu of specific performance were ordered to be assessed by the HCJ. The Koperasi was ordered to refund the deposit paid by the plaintiff under the first SPA. The appeal by the second defendant was allowed with costs. The orders of the High Court against the second defendant was set aside (see paras 39–40).

[Bahasa Malaysia summary

Koperasi Pegawai Hutan Melayu Negeri Perak Bhd ('Koperasi'), pemilik berdaftar sebidang hartanah, memeterai satu perjanjian jual beli ('PJB pertama') dengan seorang bernama Lim Chong Yean ('plaintif') bagi jualan hartanah ini. Hartanah tersebut mempunyai sekatan kepentingan; ia tidak boleh dipindah milik tanpa kebenaran bertulis Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur ('pihak berkuasa negeri'). Perjanjian jual beli pertama menetapkan syarat agar Koperasi memperoleh kebenaran bertulis untuk memindah milik hartanah tersebut dalam tiga bulan. Koperasi juga wajib memohon dan memperoleh kebenaran ini, termasuk kewajipan merayu jika perlu, dalam tujuh hari dari tarikh PJB pertama. Koperasi membuat permohonan melebihi jumlah hari yang ditetapkan dan permohonan ini ditolak. Dengan rayuan, pihak berkuasa negeri memaklumkan Koperasi bahawa dokumen sokongan Koperasi tidak lengkap. Walau bagaimanapun, Koperasi tidak memberi jawapan. Selepas kaveat plaintif luput, Koperasi memeterai satu lagi PJB ('PJB kedua') dengan seorang bernama Khong Yoke Bee ('defendan kedua') bagi penjualan hartanah yang sama. Kali ini, Koperasi berjaya memperoleh kebenaran pihak berkuasa negeri. Koperasi memulangkan wang pendahuluan yang dibayar oleh plaintif bawah PJB pertama namun perayu memulangkannya semula kepada Koperasi. Pada masa yang sama,

A hartanah tersebut dipindah milik kepada defendan kedua walaupun plaintif dan penyewa kecilnya masih menghuni hartanah tersebut. Koperasi memulakan prosiding di mahkamah sesyen terhadap plaintif dan penyewa kecilnya untuk mendapatkan semula milikan kosong. Plaintif menuntut balas terhadap Koperasi dan defendan kedua. Kemudian, plaintif memulakan satu
B tindakan di Mahkamah Tinggi untuk mengisytiharkan PJB pertama sah dan boleh dikuatkuasakan dan memohon pelaksanaan spesifiknya. Dalam tuntutannya terhadap defendan kedua, plaintif memohon satu perintah pengisytiharan bahawa PJB kedua tertakluk pada hak terdahulu plaintif atas hartanah. Defendan kedua mendalihkan: (a) dia tiada apa-apa pengetahuan
C tentang PJB pertama; (b) pelanggaran-pelanggaran oleh Koperasi tiada kena-mengena dengannya; dan (c) sebagai pemilik berdaftar hartanah, hak-hak dan kepentingannya bawah undang-undang dilindungi oleh Kanun Tanah Negara ('KTN'). Kedua-dua guaman digabung dah dibicara bersekali oleh hakim Mahkamah Tinggi ('HMT'). Pada penutup perbicaraan, HMT
D membenarkan tuntutan plaintif dan menolak tuntutan Koperasi. Tuntutan Koperasi di mahkamah sesyen bagi milikan kosong juga ditolak. Hakim Mahkamah Tinggi seterusnya memerintahkan pelaksanaan spesifik PJB dan defendan kedua diperintah memindah milik hartanah tersebut kepada plaintif. Maka timbul rayuan-rayuan ini oleh Koperasi dan defendan kedua.

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Diputuskan, membenarkan sebahagian rayuan oleh Koperasi; membenarkan rayuan oleh defendan kedua dengan kos:

(1) Sebagai pemilik berdaftar, defendan kedua telah memperoleh hak milik
F tidak boleh disangkal bawah s 340 KTN. Hak milik ini hanya boleh dicabar dan ditewaskan oleh mana-mana alasan yang dinyatakan dalam s 340(2) KTN. Ketiga-tiga alasan atau pengecualian ketidakbolehsangkalan yang diperuntukkan bawah s 340(2) adalah khasnya bagi kes melibatkan: (a) penipuan atau salahnyataan yang orang
G yang memegang hak milik tersebut ada pengetahuan tentangnya; (b) satu pendaftaran yang diperoleh melalui pemalsuan atau instrumen yang tidak lengkap atau terbatal; dan (c) apabila hak milik atau kepentingan diperoleh secara tidak sah oleh orang yang memegang hak milik melalui langkah yang didakwa dibuat dengan kebenaran sah. Hanya jika
H pengecualian-pengecualian ini wujud barulah pendaftaran hak milik defendan kedua boleh diketepikan. Walau bagaimanapun, kesemua alasan-alasan ini tidak dibangkitkan oleh plaintif. Jelas bahawa hak milik defendan kedua tidak dicabar kerana diperoleh melalui cara-cara yang diperuntukkan bawah s 340(2) KTN (lihat perenggan 14 & 16).

I (2) Isu antara plaintif dan defendan kedua adalah saingan kepentingan. Kepentingan plaintif bawah PJB pertama dan defendan kedua, bawah PJB kedua. Ini ditafsir sebagai saingan antara kepentingan boleh daftar, jika ada, plaintif terhadap kepentingan boleh daftar dalam hartanah defendan kedua. Perjanjian jual beli kedua mungkin memberi

kepentingan tidak berdaftar pada plaintif. Walau bagaimanapun, pendaftaran hak milik defendan kedua sememangnya menewaskan apa-apa kepentingan pada plaintif. Oleh kerana hak milik defendan kedua dalam kes ini tidak didakwa tertewas bawah s 340(2), hak-hak dan hak miliknya dilindungi oleh peruntukan tersebut. Maka perintah-perintah HMT iaitu mengarahkan defendan kedua memindah milik hartanah tersebut kepada plaintif satu kekhilafan sama sekali bawah undang-undang dan wajar diketepikan. Perintah pelaksanaan spesifik PJB pertama jelas menyalahi undang-undang (lihat perenggan 22 & 24).

(3) Undang-undang memerintahkan relief spesifik, memberi mahkamah budi bicara untuk menjalankan, dengan mempertimbangkan fakta-fakta dan hal-hal keadaan kes, tindakan pihak-pihak dan hak-hak kontraktual masing-masing. Perjanjian jual beli pertama dimeterai pada 2006. Selepas memeterai PJB pertama, plaintif menyewa hartanah daripada Koperasi dan kekal menghuninya. Dia menunggu hingga 2013 untuk memfailkan guaman. Plaintif lalai akan haknya sementara memperoleh wang hasil sewaan hartanah tanpa apa-apa aduan selama lebih enam tahun. Koperasi memohon kebenaran pihak berkuasa negeri walaupun di luar masa. Apabila kebenaran ditolak dan rayuan dibuat, plaintif tidak berbuat apa-apa. Perjanjian jual beli kedua dimeterai pada 2012. Berdasarkan hal-hal keadaan ini, perintah relief spesifik bukanlah remedi yang sesuai. Selepas kelewatan sedemikian, perintah relief spesifik yang diberi memberi kesan, bukan sahaja pada defendan kedua, tetapi juga kepentingan perundangan bank pemajak yang membiaya (lihat perenggan 34–36).

(4) Rayuan Koperasi dibenarkan sebahagiannya. Perintah relief spesifik yang dibuat oleh HMT terhadap Koperasi diubah dengan membenarkan tuntutan ganti rugi plaintif. Ganti rugi sebagai ganti pelaksanaan spesifik diperintahkan agar ditaksir oleh HMT. Koperasi diperintahkan memulangkan wang pendahuluan yang dibayar oleh plaintif bawah PJB pertama. Rayuan oleh defendan kedua dibenarkan dengan kos. Perintah-perintah Mahkamah Tinggi terhadap defendan kedua diketepikan (lihat perenggan 39–40).]

Notes

For cases on sale and purchase of property in general, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reisue) paras 4905–4917.

Cases referred to

Bank Bumiputra Malaysia Bhd v Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md Jamin, Intervener) [1989] 1 MLJ 381, FC (refd)
CIMB Bank Bhd v AmBank (M) Bhd & Ors [2017] 5 MLJ 142, FC (refd)
Hassan v Ismail [1970] 1 MLJ 210, FC (distd)

KS Energy Services Ltd v BR Energy (M) Sdn Bhd [2014] 2 SLR 905, CA (refd)
Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768; [2014] 2 MLRA 432; [2014] 1 CLJ 987, FC (refd)
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223, CA (folld)
Meenachi Holding & Trading (M) Sdn Bhd v Serba Kemas Sdn Bhd & Anor [2016] 1 MLJ 656; [2015] 9 CLJ 979, CA (refd)
Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224, FC (refd)
PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136, FC (refd)
Tan Chiw Thoo v Tee Kim Kuay [1997] 2 MLJ 221, FC (refd)
Tuan Haji Ahmad Abdul Rahman v Arab Malaysian Finance Bhd [1996] 1 MLJ 30, FC (refd)

Legislation referred to

Contracts Act 1950 s 32
National Land Code ss 340, 340(2), (3)
Specific Relief Act 1950 ss 11(2), 26, 26(b)

Appeal from: Civil Suit No 22NCVC-583–10 of 2013 (High Court, Kuala Lumpur)

Richard Tee (Caryn Shua with him) (Richard Tee & Chin) in Civil Appeal No W-02(NCVC)(W)-1000–06 of 2015 for the appellant.
Edmund Bon Tai Soon (New Sin Yew with him) (AmerBON) in Civil Appeal No W-02(NCVC)(W)-1030–06 of 2015 for the appellant.
Joseph Yeo (Kelvin Ng with him) (BB Teh) in Civil Appeal Nos W-02(NCVCC)(W)-1000–06 of 2015 and W-02(NCVC)(W)-1030–06 of 2015 for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] Koperasi Pegawai Hutan Melayu Negeri Perak Bhd ('the Koperasi') was the registered owner of PN 29830, Lot No 45478 Mukim Batu, Daerah Kuala Lumpur ('the property'). The property had a restriction in interest in that, it could not be transferred without the written consent of the Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur ('the state authority').

[2] The Koperasi, the first defendant, entered into a sale and purchase agreement ('the first SPA') on 7 November 2006 with the plaintiff (Lim Chong Yean) for the sale of the property at a price consideration of RM650,000. The plaintiff paid a deposit of RM65,000 and thereafter lodged a caveat on the property.

[3] The first SPA is conditional upon the Koperasi having obtained the

written consent to transfer the property within three months. Under cl 3.2, it was incumbent on the Koperasi to, within seven days from the date of the first SPA, use its best endeavours and efforts to apply for and obtain the requisite consent, including the obligation to appeal, if required.

[4] An application for consent by the Koperasi was made only on 26 December 2006, beyond the stipulated seven days. It was rejected and by a letter dated 19 November 2007 the Koperasi communicated the same to the plaintiff. In response to the appeal by the Koperasi made on 10 July 2007, the state authority replied stating that the supporting document was insufficient, and requested for a letter of support by an estate agent, to show efforts made by the Koperasi to secure a bumiputra purchaser. The Koperasi did not respond.

[5] The first caveat lodged by the plaintiff expired on 15 November 2012. The Koperasi then entered into another SPA ('the second SPA') on 27 November 2012, with Khong Yoke Bee ('the second defendant') and sold the property for RM1,430,000. The second defendant paid a deposit under the second SPA. This time the Koperasi obtained the consent required from the state authority, vide a letter dated 15 January 2013.

[6] On 8 March 2013 the Koperasi returned the deposit which was paid by the plaintiff under the first SPA by issuing a cheque, in the sum of RM65,000. About a month later however, the plaintiff returned the cheque to the Koperasi.

[7] Having obtained the requisite consent the property was transferred to the second defendant which took effect on 22 August 2013. The second defendant's financier, CIMB Bank Bhd had also registered a charge on the property.

[8] Meanwhile, the plaintiff lodged another caveat on 21 December 2013. At that time the property was already transferred to the second defendant. By an order of the High Court, the caveat was removed. Both the plaintiff and his sub-tenant were still in occupation of the property at that point in time. The Koperasi then initiated proceedings at Kuala Lumpur Sessions Court in a Suit No A52-2056–10 of 2013 against the plaintiff and his sub-tenant to recover vacant possession. The plaintiff made a counterclaim against both the Koperasi and the second defendant. Later, the plaintiff initiated an action at Kuala Lumpur High Court, to declare that the first SPA was still valid and enforceable and sought for specific performance of that first SPA.

[9] Both suits were eventually consolidated and were heard together by the learned High Court judge. After a trial the learned High Court judge allowed the claim by the plaintiff and dismissed the claim of the Koperasi against the plaintiff and his sub-tenant. The claim made by the Koperasi for vacant

possession against the plaintiff vide Sessions Court Suit No A52–2056–10 of 2013 was dismissed. The claim by the plaintiff was allowed and the learned High Court judge had ordered for specific performance of the first SPA against both the Koperasi and the second defendant.

[10] Arising from that decision, there were two appeals filed before us Appeal No W-02(NCVC)(W)-1000–06 of 2015 is by the Koperasi. In Appeal No W-02(NCVC)(W)-1030–06 of 2015, the second defendant is appealing against that same decision of the learned High Court judge.

[11] We have allowed the appeal by the Koperasi in Appeal No W-02(NCVC)(W)-1000–06 of 2015, in part. We set aside the order of specific relief against the Koperasi as well as the second defendant and allowed the claim of the plaintiff for damages in prayer 54(h) of the statement of claim. We have ordered for damages to be assessed by the learned trial judge. We further ordered the Koperasi to return the deposit of RM65,000 paid by the plaintiff, together with judgment interest of 5% from the date of the judgment by the High Court till realisation. Consequently, we have allowed the appeal by the second defendant.

[12] From the facts of the present appeal, we found it convenient and necessary to first determine the position of the second defendant being the registered owner obtained pursuant to the second SPA. It would be necessary in our view, to ascertain the legal title of the property in order to make a determination on the appropriate and suitable remedies to the respective parties in the suit.

[13] As holder of a registered title the second defendant is protected by s 340 of the National Land Code ('the NLC'). The plaintiff in his claim against the second defendant sought for an order for a declaration that the second SPA was subjected to the plaintiff's prior right to the property. The second defendant's pleaded defence is that the allegation of breaches by the Koperasi has nothing to do with her. She is now the registered proprietor of the property and in essence pleaded that her rights and legal interest are protected under the NLC. In evidence, she denied that she had any knowledge of the first SPA between the plaintiff and the first defendant.

[14] We would begin our discussions with the legal position of the second defendant as a person with the rights of a registered land owner under the NLC. As a registered owner, the second defendant had obtained an indefeasible title which is protected under s 340 of the NLC. We reproduce below the said section for better appreciation of the issues raised.

PART TWENTY — INDEFEASIBILITY OF TITLE AND INTEREST

340 Registration to confer indefeasible title or interest, except in certain circumstances

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent —

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

341 Adverse possession not to extinguish titles or interests

Adverse possession of land for any length of time whatsoever shall not constitute a bar to the bringing of any action for the recovery thereof by the proprietor or any person or body entitled to an interest therein, and accordingly, the Limitation Act 1953 *[Act 254]*, shall in no circumstances operate to extinguish any title to, or interest in, land.

[15] The legal position of a registered title was well illustrated by the Federal

A Court case of *Tan Chiw Thoo v Tee Kim Kuay* [1997] 2 MLJ 221. In that case there were two titles issued over the same piece of land by the state authority. One was issued in 1968 and another in 1972. The Federal Court held that the alienation of the land had taken effect upon registration of the register of document of title in 1968. The indefeasibility of that title can only be defeated B by any of the grounds specified under s 340 of the NLC or on any grounds of equity. Thus within the principle and *raison d'etre* of *Tan Chiw Thoo* the title of the second defendant in this case, can only be challenged and defeated by any of the stated grounds in s 340(2).

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[16] None of these grounds was raised by the plaintiff to defeat the title registered in the name of the second defendant. It bears repeating that these three grounds or exceptions to the indefeasibility as laid down in s 340(2) are essentially, in a case involving fraud or misrepresentation to which the person D having the title was privy to; a registration obtained by forgery, insufficient or void instrument; and lastly where the title or interest was unlawfully acquired by the person having the title in purported exercise of lawful authority. Clearly from the pleaded case the second defendant's title was not challenged for being obtained through any of the means provided under s 340(2).

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[17] Only if any of these exceptions exists, then the registration of title of the second defendant is liable to be set aside. In *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136, it was emphasised by the late Raja Azlan Shan CJ at p 138 that:

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> The concept of indefeasibility of title is too deeply embedded in our land law that it seems almost trite to restate it. Therefore the registration of the transfer of the said land under the National Land Code defeats all the prior unregistered interests in that land unless the party who acquires the registered title has been guilty of fraud ...

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[18] The concept of indefeasibility was further explained by the Federal Court in the case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; [2014] 2 MLRA 432; [2014] 1 CLJ 987 where Jeffrey Tan FCJ said:

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> [41] Before we adjourn, we would summarise the foregoing and pass on the following, as a guide to the trial courts. Whenever a registered title or interest is sought to be set aside under s 340, first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If the title or interest is registered in the name of an immediate purchaser, I the *bona fide* of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s 340(2) had been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in s 340(2) would not affect the title or interest of a *bona fide* subsequent purchaser. The

title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a *bona fide* subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.

[19] On the facts of this present appeal the learned trial judge found as a fact, that the second defendant seems to be aware of the existence of the earlier First SPA and hence her title may be defeated. The learned judge supported her finding by analysing the various evidence put before her. We have no reason to differ from this fact finding which was based on *vica voce* evidence before the learned judge. That notwithstanding, we are of the view that the learned judge had erred on the application of the law.

[20] A bona fide purchaser without notice applies to a subsequent purchaser or transferee. A defence of bona fide purchaser simply cannot apply to an immediate purchaser if the title is for example obtained by fraud to which he is a party or privy to. If for example, the second defendant herein subsequently transfers the property to another third party, this third party would be the subsequent transferee who if he is a bona fide purchaser for a valuable consideration will be protected by the proviso to s 340(3) (see also *Meenachi Holding & Trading (M) Sdn Bhd v Serba Kemas Sdn Bhd & Anor* [2016] 1 MLJ 656; [2015] 9 CLJ 979).

[21] In our view we would not be wrong, on the facts of this case, to assume that the chargee bank, which financed the second defendant's purchase would be the bona fide purchaser referred to in the proviso to s 340(3) of the NLC (see Federal Court decision in *CIMB Bank Bhd v AmBank (M) Bhd & Ors* [2017] 5 MLJ 142). Thus, if at all, a defence of bona fide purchaser is to be raised, it may only be available to the chargee bank under s 340(3).

[22] The issue between the plaintiff and the second defendant is that of two competing interests. The plaintiff's interest, under the first SPA and the second defendant, under the second SPA. It has been translated into a contest between a registerable interest (if any) of the plaintiff against the registered interest in the property of the second defendant. The first SPA may have conferred unregistered interest on the plaintiff. The registration of title on the second defendant had indeed defeated any unregistered interest of the plaintiff. As we have alluded to in para 17 above this form of competing interest has been well settled in *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd*.

[23] The Federal Court case of *Bank Bumiputra Malaysia Bhd v Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md Jamin, Intervener)* [1989] 1 MLJ 381 had also clearly demonstrated the above trite legal position. In that

A case, the plaintiff bank which was a chargee of five pieces of land, applied to the court for orders for sale of the land by public auction. The application was opposed by the chargor. Meanwhile, the intervener who was the purchaser of the land was allowed to intervene in the proceedings. Over the objections of both of them, the order for sale was granted by the court. The intervener B appealed on the ground, inter alia, that she signed the sale for one of the pieces of land before the charge was created. She therefore claimed that she had priority over the charge as she bought the land before the charge and hence *qui ptior est tempore potior est jure*, that is, he who is earlier in time is stronger in law. The Federal Court held that the bank as a registered chargee, had attained an C indefeasible title against the world, save for the exceptions as set out in s 340(2). When the exceptions to this section do not apply as in the instant appeal, the supervening title would defeat a prior equitable right or interest.

D **[24]** The facts of the present appeal fall squarely within *Bank Bumiputra Malaysia Bhd v Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md Jamin, Intervener)*. The registration of title of the second defendant had defeated any unregistered interest of the plaintiff. Since the registered title of the second defendant in this case had not been sought to be defeated under E s 340(2), her rights and title are protected by that provision. In light of this legal position the orders by the learned trial judge in causing the second defendant to transfer the property to the plaintiff is wholly wrong in law and is liable to be set aside. On that reason alone the order of specific performance of the first SPA against the second defendant is clearly unlawful.

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[25] We then dealt with the alleged breaches by the plaintiff against the Koperasi under the first SPA. Learned counsel for the second defendant had submitted before us that the first SPA was a contingent contract within the meaning of s 32 of the Contracts Act 1950. Learned counsel contended that G being a contingent contract the failure to obtain approval from the authority had rendered the contract void. We were not prepared to hold the first SPA void, on the grounds as stated. In our view there were unfulfilled obligations which the Koperasi failed to undertake under the first SPA.

H **[26]** The learned trial judge found the Koperasi in breach of the terms of the first SPA when it failed to apply for consent within seven days from the date of SPA of 7 November 2006. The Koperasi in fact did so only on 26 December 2006. The appeal to the state authority was made only seven months later on 10 July 2007 which was outside the time stipulated under the first SPA. Also, I when the state authority requested for further information, there was nothing forthcoming from the Koperasi. In fact, the witness for the Koperasi, DW1, admitted that nothing was done to attend to the request of the state authority. The learned judge found the Koperasi had breached the 'all reasonable' or 'best endeavour' clause, citing the decision of the Court of Appeal Singapore in *KS*

Energy Services Ltd v BR Energy (M) Sdn Bhd [2014] 2 SLR 905.

[27] Learned counsel for the Koperasi admitted that there was a delay in the application to the state authority by the Koperasi, but submitted that it was not a breach of cl 3.2 of the first SPA because there was no objection made by the plaintiff. Learned counsel further submitted that the plaintiff was represented by a solicitor, and that there was nothing to show that the plaintiff had asked the Koperasi to appeal, that the plaintiff did not ask his solicitors to write to the Koperasi to confirm if the first SPA was still valid. In short, learned counsel had completely failed to address how the learned trial Judge had gone wrong in making a finding of breach by the Koperasi of the first SPA. Except for repeating the fact that the first SPA could not be proceeded with, because consent was never obtained, the issues raised by learned counsel on this particular issue was less inspiring and completely bereft of any merit, both on facts and law.

[28] In our view however, the finding of breaches by the Koperasi under the first SPA made by the learned judge was well supported by evidence both oral and documentary which we found to be well founded. We at the appellate stage would refrain from disturbing these findings of facts as we did not find the learned judge was plainly wrong. We were therefore in agreement with the learned judge that the Koperasi was in breach of the first SPA, for delaying the application to the state authority and not pursuing the appeal, and thereby in breach of duty to act on the best endeavour clause.

[29] Having agreed that the Koperasi was in breach of the first SPA we then proceeded to examine the remedies ordered by the learned judge. Recognising that specific relief was a discretionary remedy the learned judge proceeded to grant the specific relief sought for by the plaintiff against the Koperasi and the second defendant to perform the first SPA. We list below the relevant orders made by the learned High Court judge for better appreciation of the issues:

(c) specific performance of the first SPA dated 7 November 2006 between the plaintiff and the first defendant is hereby ordered;

(d) it is also ordered that D1 and/or the D2 within 14 days from the date of this judgment apply to the Jawatankuasa Kerja Tanah Persekutuan for consent to transfer the property to the plaintiff;

(e) it is further ordered that D1 and/or D2 take all necessary steps to redeem the property from the present chargee of the property;

(f) it is ordered that D1 and/or D2 within one month from this judgment execute a valid and registrable instrument of transfer in a respect of the property and deliver the instrument of transfer together with the issue document of title of the property to the plaintiff;

A (g) in the event D1 and/or D2 breach the order in (f) above, it is further ordered that the senior assistant registrar is authorized to execute the documents in connection with the transfer; and

(h) orders (f) and (g) are subject to consent being obtained. If no consent is obtained, damages will be assessed by the learned SAR.

B

[30] In her grounds of judgment Her Ladyship had gone into great length to support her decision to accord the remedies of specific relief to the plaintiff. In granting the specific relief prayed for, the learned judge had also applied s 26 of
C the Specific Relief Act 1950. The learned judge opined that s 26(b) affords protection to a subsequent purchaser subject to an earlier contract. The learned Judge further found the second defendant had failed to prove that she was a bona fide purchaser and had entered into the second SPA with notice of the existence of the first SPA. Section 11(2) of the Specific Relief Act was also relied
D to support her decision that in a deal involving land, the court can presume that a breach to transfer immoveable property, cannot be adequately relieved by compensation in money.

[31] As we had stated above, we would reiterate that in view of the
E indefeasibility of the title of the second defendant, ipso facto the specific orders on the second defendant is unlawful. In our view therefore, the remedy of damages for the breaches of the first SPA would be more appropriate in the circumstances.

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[32] That apart, the specific performance of the first SPA was also inappropriate for other reasons. Firstly we did not find s 26 of the Specific Relief Act applicable and we disagreed with the learned trial judge when at para 74 Her Ladyship held that:

G 74. Section 26(b) affords protection to a subsequent purchaser who purchases the property, which is subject to an earlier contract, in good faith and for value without notice of the original contract. It is settled law that the onus of proof of good faith is upon the subsequent purchaser who claims that he is an innocent or bona fide purchaser for value and without notice of the original contract.

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Section 26(b) is a provision to allow the successor in title to a party in a contract to pursue the rights against the other party. As the illustration (a) to that provision suggests, specific relief may be obtained by a successor in title against the other contracting party, in the event the original contracting party's title
I passes on to the claimant.

[33] The learned judge relied on the Federal Court case of *Hassan v Ismail* [1970] 1 MLJ 210 to support the proposition that specific relief maybe granted in a case where a property for sale is subject to a subdivision. Further to that Her

Ladyship relied on the case of *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224. In our view reliance by the learned judge on the decision of the Federal Court in *Hassan v Ismail* was misplaced. In that case, the agreement between parties which was conditional upon subdivision was granted with specific relief despite it being a conditional contract, cannot apply here because the circumstances and the facts of the instant appeal are very different. The conduct of the plaintiff and other matters discussed in this appeal were not present in *Hassan v Ismail*, to justify that the same specific relief is available to the plaintiff.

[34] The law on granting orders of specific relief, the way we understand it, confers the court the necessary discretion to be exercised, by giving consideration to the facts and circumstances surrounding the case, the conduct of the parties and their respective contractual rights. In the present case the first SPA was entered on 7 November 2006. The property had restriction in interest where it can only be transferred after consent from the state authority is obtained. The plaintiff after entering into the said first SPA rented the property from the first defendant and remained in occupation. Admittedly the plaintiff remained in the property at a monthly rental of initially RM600 and later RM1000, but agreed to have benefitted an earning of RM700 from subletting with no costs to him. The plaintiff waited till 2013 to file a suit. The plaintiff sat comfortably on his rights while earning from the subletting of the property without any complaint for over six years.

[35] Obligations were imposed under the first SPA for the Koperasi to apply for the consent from the state authority within seven days, which the Koperasi did, albeit out of the time stipulated in the first SPA. But when the consent was declined and an appeal was made on the same, the plaintiff did not do anything more. The second SPA only took place on 27 November 2012 which was six years after the first SPA. The second defendant had even paid up the full purchase price and had obtained the transfer of the property. The property was further charged to the financing bank, CIMB. CIMB was then the registered legal chargee which would be protected under s 340(3) of the NLC. At least on this ground the order of specific relief would have become legally imposibble.

[36] Under the above circumstances we do not agree with the learned judge that the order of specific relief was a suitable remedy. After such delay the order of specific reliefs granted affected not only the interest of the second defendant but also the financing chargee bank's legal interest. The chargee bank is not even a party to the proceedings,whereas the order would have impacted its legal rights.

[37] The plaintiff was very much aware of the second SPA after a meeting with a representative of the Koperasi, one Dato Hj Jamaluddin on 25 October

2012. Having been made aware of the second SPA the plaintiff had caused a letter to be issued around 14 November 2012 to the Koperasi making a higher offer to purchase the property. The conduct of the plaintiff in making a higher offer to the first defendant evinced an intention that the plaintiff was no longer holding himself to be bound by the first SPA. This conduct spoke volumes of the plaintiff's interest to seek for specific relief of the first SPA. We would refer to the decision of this court in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223, for which we agreed. Delay in taking action without explanation is detrimental to the party seeking relief before the court. There are ample decided authorities to support the trite legal position that the court may refuse relief to an indolent litigant. The Federal Court in *Tuan Haji Ahmad Abdul Rahman v Arab Malaysian Finance Bhd* [1996] 1 MLJ 30 had insisted on promptness of action in a case of setting aside a judgment and it must be done upon the applicant becoming aware of the irregularity and before any fresh step is taken.

[38] In conclusion having made our observations and our findings that the second defendant's title is not defeated and that there were breaches of the first SPA by the Koperasi the appropriate order would be as follows.

[39] In respect of the appeal by the Koperasi in Appeal No W-02(NCVC)(W)-1000–06 of 2015, we have allowed the appeal in part. We varied the order of specific relief made by the learned High Court judge against the Koperasi by allowing the claim for damages by the plaintiff as prayed for in para 54(h) of the statement of claim. We have ordered for damages in lieu of specific performance, to be assessed by the learned High Court judge. We further ordered for the Koperasi to refund the deposit paid by the plaintiff under the first SPA together with judgement interest of 5% from the date of the judgement of the High Court.

[40] In respect of Appeal No W-02(NCVC)(W)-1030–06 of 2015 by the second defendant, we have allowed the appeal with costs of RM30,000 here and below to the second defendant subject to payment of allocatur. The orders of the High Court against the second defendant were set aside.

Order accordingly.

Reported by Afiq Mohamad Noor